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**DELEGATION OF POWERS TO ADMINISTRATIVE
AGENCIES VS PRINCIPLE OF SEPARATION OF
POWERS UNDER FDRE CONSTITUTION**

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Addis Ababa, Ethiopia

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faculty of law, St. Mary's University College.

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July 2008

I hereby declare that this paper is my original work and I take full responsibility for any failure to observe the conventional rules of citation

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INTRODUCTION

The 1994 constitution of the Federal Democratic republic of Ethiopia has established federal system of government by which all nation, nationalities and peoples of Ethiopia could form a union based on a democratic equality.

One of the core points of federalism rest on how powers and function are separated between the central and state governments, as well as the three branches of government.

The basic purpose of this paper is to examine how powers and functions are shared among the there branches of governments and the application of the doctrine of separation of powers in relation to administrative agencies which have established and exercising certain powers. In order to reach to a conclusion whether or not separation of power in the Ethiopian context is made in a fair manner, the study is made to have a content analysis on the powers of administrative agencies and the doctrine of separation of powers incorporated in the constitution. Hence the paper is designed to accommodate three chapters.

Chapter One: - Deals with definition of delegation powers and delegation, general back ground of the concept of separation of power it includes history and definition of the concept of separation of powers.

Chapter Two: - Chapter two is made to contain how the concept of separation of powers existed in Ethiopia it includes the powers and function of the legislature, executive and the judiciary among the two levels of government.

Chapter three: - Deal with administrative agencies in whole, it includes definition, power, and reasons for delegated power of administrative agencies. In addition to this for the purpose of analysis, this chapter deeply deals with the powers delegated to administrative agencies in relation with separation of powers. Furthermore, conclusion and recommendation is done under this chapter.

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Chapter one

1. An over view of delegation, delegation of power and general background to the concept of separation powers

1.1 Definition of delegation

Delegation of power is a transfer of authority by one branch to another branch or to an administrative agency.¹ Delegation is the act of ensuring another with authority or empowering another to act as an agent or representative.² Delegation is the act of delegation, or investing with authority to act for another the appointment of delegate or delegates.³

Microsoft ® Encarta 2007 (ous) Redmond WA Microsoft corporation, 2006, defines the phrase as follows: Delegation is passing responsibility for carrying out a task down the chain of command. For example, a managing director may delegate control of finance to the company secretary. A foreman may delegate responsibility for supervising group of machines to workers.⁴

Wade administrative law does not directly define the term (universal definition) but it puts helpful example of delegation. The examples are typical cause related to Indian government.

A. The case was registered dock workers were suspended from their employment after a strike. The power to suspend Dockers under the

¹ Blacks Law Dictionary (18th ed.), USA, P.459

² Ibid

³ [Http/www.Brainy quote.com](http://www.Brainyquote.com)

⁴ Microsoft Encarta, 2007 (DVD)

statutory dock labor scheme was vested in local dock labor board. The suspensions were made by the port manager, to whom the board had delegated its disciplinary power.⁵

B. A local board had power to give permission for the laying of drains. They empowered their surveyor to approve straight for ward application, merely reporting the number of such cases to the board.⁶ This shows that delegation of power of local board to the surveyor.

C. The case where a local education committee left it to its chairman to fix the date of closure of the school.⁷ This example shows a case where the power vested on the local education committee is exercised by the chairman to whom the power is delegated.

D. A local authority, having a statutory power to provide housing for homeless person, setup a company, which purchased houses, financed by a loan from a bank, which the council guaranteed.⁸ Here we can see transfer of power of housing to the company since it is the local authority whom is vested with such a power.

From all the above examples used define the term and the direct definitions forwarded by different writer, it can be understood that delegation is all about the process of giving or delivering power that one organ is vested with to another organ to exercise it. As I have seen those different definitions, delegation is an act that always held between governmental organs, and which is the main concern of the researcher.

1.2 General Background to the concept of separation of powers

The concept of separation of powers between the three organs of government refers, as I understand it, to the relation between the three

⁵ H.W.R Wade administrative law (19th ed)p313

⁶ Ibid

⁷ Ibid

⁸ Ibid p.312-314

branches of government. This relationship between them provides that the discharge of their respective constitutional mandates or responsibilities. I, therefore see my task as showing the extent of relationship between the three organs of government under the 1994 constitution. I will attempt to explain as far as I can, the scope and nature of this relationship in light of administration of the government, which exercised by administrative agencies and on the basis of constitutional principles. Let me begin my explanation by stating generally.

^ History of the concept of separation of powers and

^ What is meant by separation of powers.

1.2.1 History of the concept of separation of powers

Aristotle was the first philosopher who formulated such a divisions of “terms of government” no relation to states powers. The basis of his analysis was the need of having a government where equity rules and this government is to be found when it functions under the limitations of law.

Accordingly from this analysis we understand that the act of the three branches of government must be limited by law. Because this limitation of power and specification of functions is very important for the application of the principles of justice used to correct laws when these would seem unfair in special circumstances.

So Aristotle’s approach is the first systematic analysis of the power of the state in that are points out the need for legal limitations on such power.

For the development of the Aristotle’s approach, establishment of the constitutional government is an important matter. Then , the theoretical foundations of modern constitutional government were laid down in the writings of Hobbes, lock and Rousseau and their thinking power fully

influenced the great period of constitution making exemplified by the American declaration of independence and bill of rights and the French declaration of right of man .⁹

In 1690 Locke published his seminal two treaties of government. His assertion is that, all legitimate government rests up on the “consent of the government profoundly altered discussions of politics theory and promoted the development of democratic institutions.¹⁰ With his assertion, lock argued, and guarantees to all men basic rights, including the right of life, to certain liberties, and to own property and keep the fruits of one’s labor. To secure these rights, he has reasons that, man civil society enter in to a contract with their government.¹¹

The citizen is bound to obey the law, while the government has the right to make laws and to defend the common wealth from foreign injury all for the public good. In addition, he asserted that when any government, becomes lawless and arbitrary, the citizen has the right to overthrow the regime and institute a new government

From the assertion of lock, what the writer understands is that, the general purpose of the establishment of constitutional government is, for the sec of protection of public interests, as well as individual rights. If the government is not protect the public interest and individual rights liberties by enacting different laws, it is, not serving the people as a government, and it is replaced by the new government bed on the interest of the people. This refers, as understand it is a clear justification for constitutional democrat and power limitation for governmental branches.

⁹ Danid m walker,(the oxford companion to law (1980) New York p.278

¹⁰ Information magazine (what is democracy) (October 1991).USAp.15

¹¹ Ibid

Next to lock, Montesquieu was another founder of constitutional democracy. He provides that:

When the legislative and executive powers are untied in the same person or body, there can be no liberty, because apprehension may arise lest the same monarch or senate should enact tyrannical laws to execute them in tyrannical manner, and where the power of judging jointed with the legislative the life and liberty of the subject would be expose to arbitrary control, for the judge would than be the legislator . Where it joined the executive power, the judge might behave with the violence of an operation.¹²

Especially the American constitution of 1789 is reputed for its having faithfully incorporated the concept of separation of powers as expressed by Montesquieu. Hence, *Article I* treats the legislative power and puts it in congress. A two-power legislature of defined authority. *Article II* places a largely defined executive power in a unitary executive, an elected president. *Article III* locates the judicial power in the Supreme Court, the state courts and any lower federal courts congress may choose to crate. *Article IV* then touches in a variety of ways the other great separation of power already mentioned that between the national government and the sates.¹³

However , the constitution of Ethiopia 1994 by its structure only seems similar approach by vesting , under *Article 55(1)* , in the house of peoples representatives, the power legislative in all maters falling with in federal jurisdiction and it is supreme than the order branches of the government. The constitution of Article 72(1) vests the highest executive power in the prime minister and the council of minister who together constitute the executive branches. While *Article 78(2)* vests supreme

¹² Montesquieu, the sprit of laws (1949)VIp.150

¹³ Petter L.strauss (An introduction to administrative justice in the United States 1989. (USA)p.12

federal judicial authority in the federal Supreme Court's, and in such federal high courts and federal first-Instance courts as the house of peoples representatives may establish.

According to the writer's view this does not mean that, the practice of the concept of separation of powers in U.S.A , and in Ethiopia is the same. Hence, the U.S.A practice provides that all the executive powers vested in a president, legislative power given to the congress and judicial power for judicial branches of the U.S.A government. Then, based on this fact the practice of check and balance between the three branches of government in the U.S.A as exercised strongly. According to the Montesquieu approach. So, it is possible to conclude that the existence of the three branches of government in U.S.A are in parallel lines. This basic compromising instrument is the U.S.A constitution only .But in Ethiopia, the judicial branch has no power to review the laws enacted or passed by the parliament, and depending on position of the prime minister which is given by the government. Accordingly, the Ethiopian practice shows that, there is no reasonable application of the principle of check and balance between the three branches of Government. Now, it is possible to conclude that, the constitution of Ethiopia 1994, shows that no formal recognition of the principle of Separation of powers. This is the writers view only.

1.2.2. What is meant by Separation of powers?

Like any other difficult concepts such as democracy, politics, law, and so on. Separation of powers is hardly defined. Some describe it broadly so matters would be complicated to understand, and others define it narrowly and may not contain all characteristics of it because of complexity some authors go through it with out explaining what it is

although it is difficult. Variety of definitions of the concept of separation of powers are given by certain writers on the subject matter.

Aristotle differentiated three categories of state activities as follows:

- ^ Deliberations concerning common affairs
- ^ Decisions of executive magistrates, and
- ^ Judicial rulings and indicated that the most significant differences among constitutions concerned the arrangements made for these activities.¹⁴

This three fold classification is not precisely the same as the modern distinction among legislature, executive and judiciary. Aristotle intended to make only a theoretical distinction among certain state function and stopped short of recommending that they be assigned as powers to separated organs of government.

John lock argued that: Legislative power should be divided between king and parliament¹⁵

The legal thesaurus dictionary has also stated on the matter as:-

Separation of powers is the constitutional requirement the three branches of government judiciary, legislative and executive encroach up on or usurp each others powers no branch of government should exercise the powers or functions exclusively committed to another branch.¹⁶

Dictionary of modern legal usable defines separation of powers as follows:

¹⁴ Encyclopedia Britannica Inc,(15th ed 1994). Volume 25 page 1018

¹⁵ Id, ealker cited on nate 2 p 1131

¹⁶ William statusky “wests Kegaqk thesaurus “ 1985 p 688

The phrase is usually associated with the U.S. constitutions demarcations of powers in the executive legislative and judicial branches of government. But the idea is much older.

John Locke wrote about separation of powers in his two treatises of government (1690). The phrase itself is at least a generation older than the constitution. In this spirit of the laws (1748 translated to English constitution was a system of checks and balances among executive, legislative and judiciary - a- executive privilege, legislative votes presidential appointment and impoundment power and so on the OLC has provided legal an constitutional guidance for the executive.¹⁷

Black's law dictionary puts the following definition

The government of the state and the United States divided in to three department or branches. The legislative, which is empowered to make laws, the executive which is required to carry out laws. And the judiciary which is charged with interpreting the laws and adjudicating disputes under the laws under this constitutional doctrine of "separation of powers" one branch is not permitted to encroach on the domain or exercise of powers of another branch.¹⁸

These are few among the various definitions of separations of powers as we use may infer from the above mentioned defines, one of the basic and the most significant characteristics of separation of powers is the division of powers between the three branches of government, as well as distribution of powers among the federal and state governments. If I were asked " writer professor Anderson, "to point out the common features that characterize separation of powers, I will mentions the constitutional divisions of the powers and functions between the three branches of

¹⁷ Bryan A Garner " A dictionary of modern legal usage " (2nd ed 1995) New York p 795

¹⁸ Blacks low dictionary' (6th ed 1995) USA p951 -952

government, and among the two autonomous and constitutionally recognized levels of government, the central and the regional .”¹⁹

In relation to this, another writer in the subject simplifies the definition of the concept of separation of powers by saying that “separation of powers is everywhere a compromise between the three branches of government, as well as among central and regional governments.”²⁰

¹⁹ W. Breckes Graves, American inter governmental relations p.5

²⁰ Encyclopedia Britannica inc, (15th ed. 1994) volume 4.p.712

CHAPTER TWO

2. SEPARATION OF POWERS UNDER FDRE CONSTITUTION

Pursuant to the 1994 constitution federal state structure was formed, i.e. the federal democratic Republic of Ethiopia.²¹ Accordingly the Ethiopian state was made to consist of two levels of governments:-

- i. The federal government and
- ii. The regional government.

In addition to this the constitution lays down two types of power distribution. These are, power division between the three branches of a state legislative, executive and judiciary, which is known as “Separation of powers”.²² And the allocation of power between the Federal and Regional Governments, and it is called distribution of powers.²³ Among the above mentioned two types of power divisions the first way of power division between the three branches (separation of powers is the main concern of this paper).

2.1. The Federal Government

Under the federal level we have the three branches of government., namely, the legislative, executive and the judiciary which were established in line with the principle of parliamentary supremacy as the constitution determined that the federal democratic republic of Ethiopia shall have a parliamentary form of government²⁴.

2.1.1. The legislative

²¹ Ethiopia constitution Art. 1

²² Ibid, Art. 50

²³ Ibid, Art. 50 (1)

²⁴ Ibid, Art. 45

The legislative institutions of the federal government are the two federal houses known as house of people representatives and house of federation. Then there is the president of the republic, who is the head of the government. Now let's examine the three branches of government starting with the federal houses.

2.1.1.1 House of people's representative

The house of people's representative is one of the organs placed under the legislature. It is the highest authority of the federal government.²⁵

The house of people's representatives is an institution whose members is elected for a five-year term on the basis of universal "right of voting" and by direct, free and through secret system of the voting.²⁶

It plays many important roles and functions including the legislative, financial, deliberative, representative aspects. With respect to its "power to legislate laws" the constitution states that all matters assigned----- to federal jurisdiction" fall within the "legal capacity" of the house of people representatives.²⁷ Its jurisdiction exhaustively enumerated under Art 51(1-21) from the protection and defense of the constitution, through policy formulation in political economic and social matters, to more understanding the areas specified as control of fire arms, the patenting of inventions, or the protection of copy rights and the establishment, of uniform standards of measurements and calendar are specifically defined under federal jurisdiction.

Besides these, legislation of laws on different sensitive issues such as utilization of land, natural resources and interstate lakes and rivers interstate roads, postal and telecommunication services foreign commerce, enforcement of constitutionally established rights, nationality, asylum and other issues is mandated to the house of peoples

²⁵ Ibid, Art. 50(3)

²⁶ Ibid, Art. 54

²⁷ Fasil Nahum, constitution for a nation of nations, (1999) P.69

representatives by the constitution.²⁸ In addition to this the constitution gives it power to produce labor code, commercial code, a penal code, and civil laws.²⁹ Also, it is specifically given the power to decide on the organization of national defense, public security and national police forces,³⁰ as well as the proclamation of a state of emergency,³¹ or state of war.³² Pursuant to decisions made by the council of ministers. The power to ratify international agreements interred in by the executive is also mandated to it.³³

The house of people's representatives is Specifically given the power to approve economic, social, and development policies and strategies as well as fiscal and monetary policies of the country, including legislation on the National Bank and foreign and local currency.³⁴ The ratification of budget of the federal government and levying of taxes and duties on revenue sources reserved to the federal government specifically provided for the house.³⁵

For the sec of the administration of justice, the approval of the appointment of judges,³⁶ establishment of human right commission,³⁷ and the institution of ombudsman,³⁸ as well as the determination of their powers and functions are under its powers. The house of people's representatives is also specifically provided with the power of question, to approve members of the executive,³⁹ to call and question the prime minister and other federal officials. Its questioning power encompasses

²⁸Id, cited on note 1, Art. 55 (2)

²⁹ Ibid, Art . 55 (3-6)

³⁰ Ibid, Art . 55 (7)

³¹ Ibid, Art . 55 (8)

³² Ibid, Art . 55 (9)

³³ Ibid, Art . 55 (12)

³⁴ Ibid, Art . 55 (10)

³⁵ Ibid, Art . 55 (11)

³⁶ Ibid, Art . 55 (13)

³⁷ Ibid, Art . 55 (14)

³⁸ Ibid, Art . 55 (15)

³⁹ Id, cited on nate 15

the power” to investigate the executives discharge of its responsibilities.⁴⁰ Beyond the questioning power the house may discuss any matter pertaining to the powers of the executive and may take any discussion and measure it thinks necessary. ⁴¹ However this is only done at the request of 1/3 of its members.

Also the House of People’s Representatives is mandated by the constitution with the power to established standing and Adhoc committees to accomplish its work. ⁴²

Accordingly we do have nine standing committees, which the House has established to over work through.⁴³

These are committees on:-

1. The economic affairs
2. The budget affairs
3. The social affairs
4. The defense affairs
5. The foreign affairs
6. The administration affairs
7. The legal affairs
8. The culture and communication affairs, and
9. The women’s affairs

But currently there are thirteen standing committees under the parliament code of conduct regulation.

2.1.1.2 THE FEDERATION COUNCIL

The federation council of the constitution of the 1994 is the “upper house” of “second chamber of the parliament. It is not all the legislative. Executive and the judiciary. It is the special body regarding with the

⁴⁰ Ibid, Art . 55 (17)

⁴¹ Ibid, Art . 55 (18)

⁴² Ibid, Art . 55 (19)

⁴³ Id, Nahum, cited on note 6. P.84

constitution. Each nation nationality and people is represented in the House of federation.

When we come to the functions the house of federation carried out, it is very different from that of the house of peoples representatives as it's functional competence revolves around the constitution. Let me proceed to see its powers.

Most importantly the house of federation is an organ mandated with power to interpret the constitution.⁴⁴ With this respect; we have council of constitutional inquiry through which issues of constitutional inquiry takes place and of advisory capacity made up of eleven members.⁴⁵

The president and the deputy president of the federal Supreme Court serving as president and deputy president of the constitutional inquiry. The six legal experts of the members of the constitutional inquiry are appointed by the president of the republic after being nominated by the house of people's representatives and the rest three are appointed by the house of federation from among its members. The council of constitutional inquiry is subordinate to the house of federation council and gives advises on constitutional issues.

The council of constitutional inquires has given the power to examine the constitutional issues and either send the case to the legal court after it has found no grounds for constitutional interpretation, or submit its findings for constitutional interpretation to the house of federation; who has power to discuss on it and makes the final determination.⁴⁶ It is known that, a party who is not satisfied with the order of the council of constitutional inquiry to send the case to the local court for lack of grounds of constitutional interpretation

⁴⁴ Id, cited on note 7, Art. 62(1)

⁴⁵ Ibid, Art. 82

⁴⁶ Ibid, Art. 84

may appeal against the order to the house of federation.⁴⁷

But the constitution do not define how would the federation proceed where it found the case in favor of the appellant.

Different to most federal systems around the world, which make constitutional interpretation a purely legal matter by placing it fairly in the hands of either a constitutional court or the federal supreme court, Ethiopia has choose system that benefits from authorities legal expertise with in and beyond the federal supreme court through the council of constitutional inequity, but makes the final decision a political one to be determined by the house of federation,⁴⁷ ⁴⁸ because of the supremacy of the Nations, Nationalities, and peoples sovereignty expressed by the constitution.

Based on the principles of the constitutions, the constitution is the supreme law of the land, the supreme political instrument for self-determination, peace, democracy, and socio economic development. Thus it needs an ultimate interpreter, not the highest court of law but the house of federation. Also the house of federation the collection of nations nationalities and peoples of Ethiopia, whose unity based on their mutual agreement it enhances, whose self determination it enforces and whose misunderstanding it seeks to solve, it is this political instrument that is vested with “the power to interpret the constitution”⁴⁹

Promoting the equality of the Nations nationalities and peoples of Ethiopia encompassed in the constitution and consideration of their mutual consent is another power mandated to House of federation.⁵⁰ The last phrase “Unity based on their mutual consent” on the preamble, which opens with, “We, the Nations Nationalists and Peoples of Ethiopia

⁴⁷ Ibid, Art. 84(3)

⁴⁸ Id, Nahum, cited on note 21, P. 74

⁴⁹ Id, cited on note 22, Art 62(1)

⁵⁰ Ibid, Art. 62(4)

strongly committed to build a political community”. In the same line the constitution gives the power to find solution to disputes or misunderstandings that may arise between states.⁵¹

The other important function of the house of federation is the financial function. It has to do with the division of fund between federal and state governments on revenues derived from joint tax sources. Together with this it is also empowered to determine the amount of subsidy that the federal government may provided to the states.⁵²

In Ethiopia, the house of federation has ultimate power to defend the constitutional order.⁵³ One of its important legal capacities is to order federal intervention if a member state engaged the constitutional order in violation of the constitution.⁵⁴

The provision empowered the house of federation to order the federal government to intervene “if a member state is in the process of endangering the constitutional order in violation of the constitution, is invoked either because not as issue of human right but as the constitutional crisis - thus making federal intervention unavoidable” is suggested by FASIL NAHUM. It is correct for it takes in to account the protection of human rights at the time of intervention.

Finally, The power to decide on the case of the rights of self-determination and succession of Nations, Nationalities and peoples is vested to the house of federation.⁵⁵

2.1.2. THE EXECUTIVE

The federal democratic republic of Ethiopian constitution vests the highest executive powers of federal government of Ethiopia in the prime

⁵¹ Ibid, Art. 62(6)

⁵² Ibid, Art. 62 (7)

⁵³ Id Nahum cited on note 66,m P.75.

⁵⁴ Id, cited on note 27, Art 62 (9)

⁵⁵ Ibid, Art. 62(3)

minister and the council of ministers.⁵⁶ What this implies is that two institutions, the Prime Minister and the council of ministers constitute the executive body of the federal government at its highest level. Let us see each one by one.

2.1.2.1 THE PRIME MINISTER

The Prime Minister is elected by the House of People's Representative from among its member's.⁵⁷

Different to the president the prime minister is not required to vacate his parliamentary seat on becoming prime minister. Here, the executive responsibilities is assumed by the party of coalition of parties constituting the majority in the house of peoples representatives, the leadership of prime minister shape the direct and visible linkage between politics and government.⁵⁸

When we talk of the powers and functions of the prime minister the constitution specifies as follows. He is the head of the council of minister, the chief executive, and the commander in chief of the national armed forces.⁵⁹

The constitution also empowered the prime minister with the power to lead and co-ordinate the activities of the council of ministers.⁶⁰ He ensures the implementations, of laws, policies and directions adopted by the house of people's representatives and by the council of ministers.⁶¹ Further he ensures the efficiency of the federal administrative and takes such corrective measures as are necessary.⁶²

⁵⁶Ibid, Art. 72(1)

⁵⁷Ibid, Art. 73(1)

⁵⁸Ibid, Art. 73(2)

⁵⁹Ibid, Art. 74(1)

⁶⁰Ibid, Art. 74(4)

⁶¹Ibid, Art. 74(3) and (5)

⁶²Ibid, Art. 74(8)

The power to select commissioners, auditor General, and president and deputy president of the federal Supreme Court (which are part officials of the federal Government) is vested in the prime minister and it is the house of people's representatives, which approve and appoint them.⁶³

Further the constitution gives the prime minister the over all supervision power over the implementation of the countries foreign policy.⁶⁴

The submission of nominees for medals and prizes to be awarded by president based on the laws adopted by the house of people's representatives.⁶⁵

Finally, the constitution entails heavy responsibility with duty on the prime minister. The protection of constitution,⁶⁶ the submission of periodic reports to the house of people's representatives on the states of the Nation, as to the accomplished work by the government and present on future plans are the major duties of the prime minister.⁶⁷

2.1.2.2. THE COUNCIL OF MINISTERS

The council of ministers is the one branch of the executive. Its membership includes the Prime minister, Deputy Minister, Ministers of the federal government and other officials whose membership has been determined by law.⁶⁸

Organizational, legal and economic spheres specially are the main powers and functions, which the council of ministers concerned on. Strong influence in economic matters; it plans the annual budget of the federal government and implements it up on approval by the house of people's representatives.⁶⁹ To a great extent the work planning and

⁶³Ibid, Art. 74(9)

⁶⁴Ibid, Art. 74(6)

⁶⁵Ibid, Art. 74(10)

⁶⁶Ibid, Art. 74(13)

⁶⁷Ibid, Art. 74(11)

⁶⁸Ibid, Art. 76(1)

⁶⁹Ibid, Art. 77(3)

formulation, implementation and execution of the budget is its responsibility. The formulation and implementation of economic, social and development policies and strategies are provided for in the powers and functions of the cabinet.⁷⁰ Providing important subsidies to the states for implementation of the states socio- economic policies is its powers and functions.⁷¹ It specifically empowered with ensuring the proper execution of financial and monetary policies.

Decision on the printing of money and the borrowing of internal and external loans, regulation of the circulation of money and foreign currency and administration of the National Bank are under the powers and functions of the council of ministers.⁷² The council of ministers is powerful to ensure the over all implementation of laws and decisions adopted by the House of Peoples Representatives.⁷³ It has power to issue the implementing regulations on the basis of power granted to it by the legislator.⁷⁴ In addition it ensure the observance of law and order through it's law enforcement agencies.⁷⁵ It has also power to issue decree of state of emergency and submit it to the house of people's representatives.⁷⁶

The council of ministers has the power to decide on the organizational structure of all administrative agencies and coordinating their activities and providing leadership,⁷⁷ formulation of foreign policies and exercise over all supervision over its implementation,⁷⁸ the protection of patents and copy rights,⁷⁹ and the providing of uniform standards of

⁷⁰ Ibid, Art. 77(6)

⁷¹ Ibid, Art. 77(4)

⁷² Id, cited. On note 50

⁷³ Ibid, Art. 77(1)

⁷⁴ Ibid, Art. 77(13)

⁷⁵ Ibid, Art. 77(9)

⁷⁶ Ibid, Art. 77(10)

⁷⁷ Ibid, Art. 77(2)

⁷⁸ Ibid, Art. 77(8)

⁷⁹ Ibid, Art. 77(5)

measurement and calendar⁸⁰ are also under the powers and functions of the council of ministers.

Generally, the executive branch of government is very strong than the other federal government branches.

2.1.3 The Judiciary

Concerning the judicial system, the federal Democratic Republic of Ethiopian Constitution (1994) provides for two sets of jurisdiction of courts: ⁸¹

- i. Federal courts jurisdiction; and
- ii. States (regional) court jurisdiction.

2.1.3.1 The Federal Courts jurisdiction

The constitution provides for the three layered structure of court system at the federal level; thus are federal supreme court, federal high court and federal first instate courts. The constitution gives a power to federal Supreme Court in case of cassation, review and correct any final decision of a basic error of law.⁸² Including decisions of federal court and state supreme courts.

There is a doubt that to decision of state Supreme Court may be changed in the case of cassation may result reduction of the strength of the federal system and destroying the power and authority of supreme courts. The mechanisms, which are provided in the constitution to protect this doubt, are not enough.

2.2. The State Government

State governments like that of the federal government, have all the three government branches; the legislative, executive and judiciary. The

⁸⁰ Ibid, Art. (77)

⁸¹ Ibid, Art. (80)

⁸² Ibid, Art. (80)

powers and functions of state government are not clearly enumerated. The powers of the state government are those powers that are not clearly given to the federal government. These powers, which are not clearly given to the federal government, are reserved to the state under article 52 (2) of the constitution as the general rule. Hence, it may not be possible to list down all the authorities and functions of the state governments. Article 52(1) exactly we use will try only to see some of the major powers of the three branches of state governments as follows:-

2.2.1 Legislature

The state legislative power is vested in their state council.⁸³ States are empowered by the constitution and other subordinate laws. In addition to this, state council have the power to formulate economic, social and development policies, strategies and plans of the states; to levy taxes and duties on revenue sources reserved to the states and to draw up the states budget; setting up states police force; and to enact penal laws on matters which are not covered by federal penal law.⁸⁴

The authority to adopt, draft and amend the constitution is belonged to the state council. Still, all the state constitution must be consistent with the federal constitution. Because any law customary practice or a decision of an organ of a state or public official is null and void if it be inconsistent with the federal government.⁸⁵ Generally, on matters falling under its jurisdiction, the state council has legislation power.⁸⁶

2.2.2 Executive

The executive organ of the state government have the execution powers and functions on matters reserved to it according to the federal constitution state government shall not be only at state levels but also at

⁸³ Ibid, Art. 50 (3) and (5)

⁸⁴ Ibid, Art. 52 (2) and 55 (5)

⁸⁵ Ibid, Art. 9 (1)

⁸⁶ Id, cited on note 61

other levels, such as woreda, zone etc. Powers should be given to the lowest units of government in order to enable the people to participate directly in the administration process.⁸⁷

Finally, The protection and defense of the federal constitution; the execution of the state constitution and other laws; administration of land and other natural resources in accordance with federal laws; execution of economic; social and development policies, strategies and plans of the states; collection of taxes and duties levied by the council are power and functions reserved for the state executive.⁸⁸

2.2.3 Judiciary

When we talk of the judiciary, states shall have their own separate judicial power, and this judicial power is given to the courts.⁸⁹ The highest and final judicial power over state matters is given to the state supreme court. In addition to such its jurisdiction, the state Supreme Court and high courts may exercise the powers of the federal high courts and first instant courts by means of delegation.⁹⁰ Since, the house of people's representatives didn't decide by its two-third of majority vote to set up federal courts in some states the power of federal high courts and first instant courts and delegated to the state supreme and high courts.⁹¹ Thus, the state courts will be made to exercise additional powers and makes them very powerful.

Regarding their independence state courts are free from any interference of governmental act. This implies that courts should exercise their functions with out any influence by no one else. The power to review and correct basic error of law in final decisions made by state high and first-instance courts is vested to the state supreme court. Such review and

⁸⁷ Ibid, Art. 50 (4)

⁸⁸ Ibid, Art. 52 (2)

⁸⁹ Ibid, Art. 50 (2) and (7)

⁹⁰ Ibid, Art. 80 (2) and (4)

⁹¹ Ibid, Art. 78 (2)

correction of basic error of law in case of cassation based and dealing only with state matters.⁹² Also state Supreme Court and state high court have powers of appellate jurisdiction. The constitution under Art 79(4) laid down a condition by which no judge of state courts to be removed from his duties before he reaches the retirement age determined by law.⁹³

2.3. JUDICIAL INDEPENDENCE

The judiciary is made independent by virtue of the constitution of 1994. It talks about independence of the judiciary. It states that judicial power is vested in the courts. The president and deputy president of the federal Supreme Court are appointed by the house of people's representatives, on submission of nominees by the prime minister. The federal judicial administration council makes the selection of judges.⁹⁴ It is true that the same principles and procedures apply to the state judiciary. Capital state Supreme Court president and deputy president are appointed by state councils on the basis of nominees submitted by heads of the executive. State councils also appoint state Supreme Court and high court. The powers of nominee are given to the state judicial administration council.

The federal judges and state court judges ones appointed may not be removed before reaching the legally mandated retirement age, not can their services extended beyond the mandated retirement age. There is a reason behind the fact that the federal judicial administration council and the sated judicial administration council play the same role with respect to removal from office of federal judges and state court judges.⁹⁵

With regard to financials matters courts are independent of the executive. The federal Supreme Court has power to produce the

⁹² Ibid, Art. 80 (3) (b)

⁹³ Ibid, Art. 79

⁹⁴ Ibid, Art. 81 (2)

⁹⁵ Ibid, Art. 79 (4)

administrative budget of federal courts and has power to implement it after approval by the House of Peoples Representatives.⁹⁶ Accordingly the state council produces the administrative budget of the states courts.⁹⁷ Further more, expenses used to state supreme and high courts bring before court disputes on federal matters covered by the House of Peoples Representative.⁹⁸

2.4. Judicial Review

There are two methods (ways) by which review of constitutionality can be exercised. It can be made either by the judiciary or by an organ outside the judicial system. If the judiciary makes review, we can say that there is judicial review in that specific country and if review is made by an organ outside the judicial system it is clear that there is no judicial review in that specific country.

Review of constitutionality more or less refers to the examination of government by judicial or non-judicial organ with a view to insure whether or not the actions are consistent to the provisions of the constitution. There are two types of judicial review systems:-

- These are: -
1. The centralized system and
 2. The decentralized system

1. The centralized system: - is a system by which regular courts have no power to review the constitution. Such a power is rather given to the special constitutional courts established for this special purpose.⁹⁹

In this system the power of the constitutional organ is limited to the task of interpreting the constitution.¹⁰⁰ So, Ethiopia is exercising this type of review system.

⁹⁶ Ibid, Art. 79 (6)

⁹⁷ Ibid, Art. 79 (7)

⁹⁸ Id, cited on note 7 5

⁹⁹ Mauro Capellit Judicial review in the contemporary world. The Bobbies (Merril inc. New York, 1971 p vii-vii.

2. The Decentralized system:- this system enables the regular courts of such country to have jurisdiction to decide over the constitutionality of governmental actions and promulgation of legislations that contravenes the constitution.^{100 101} This system mostly is called American system.

One can reach to a conclusion that, the Ethiopian judicial branch does not have the power of judicial review of the laws enacted by the parliament. But it has the power of judicial review over administrative acts in so far as such act infringe up on rights protected under ordinary law or even constitutionally protected rights and liberties in respect of which there is no dispute of interpretation.

2.5. The Relation Between The Three Branches Of Government Under Ethiopian Constitution

Depending on their particular goals different constitutional systems apply the theory of principle of “Separation of Powers” and the system of “checks and balances” differently. For example, the base of Montesquieus system is protection of liberty of individuals. When we look at the first two paragraphs of our constitution, we can observe that, apart from the traditional goals which existed in every state by its very nature, i.e. building political community based on the rule of law and or forming a union, establishing justice, insuring domestic peace etc, the Ethiopian people appear to have set goals. Advancing economic, individual and peoples rights are goals which to have been given fore most in our constitution.

Now let us proceed to consider the relation ship between the three branches of government under Ethiopian Constitution.

2.5.1. Legislative and executive Relation

¹⁰⁰ Ibid, P. 66

¹⁰¹ Ibid, P 66

The House of Peoples Representatives in Ethiopia exercises certain powers, which can enable it to have a control and check over the executive body. The first power by which the house can keep a check on the executive is that, the House's power of legislation, which is necessary for the implementation of the executive programs. This means that, the house can be able to check the executive through the legislations it enact for executive.

The next is that, it is the house that ratifies the annual budget, and thus, can deny the executive the funds necessary for the implementation of its programs. The house determines the size of the purse of the executive, and there fore, the strength of its financial muscle.

Thirdly, it is the House that appoints the prime minister and approves the appointment of members of the cabinet, commissions and other key executive officials. Such approval and appointment process enables the house to control in the appointment of the executive officials.

The other situation by which the legislature cheek and control the executive is, its power of question and investigate in to the discharge of responsibilities by the prime minister and other federal officials.¹⁰² And to discuss any matter pertaining to the power of the executive.¹⁰³ When we look at the two constitutional provisions Art 55(17) and [18] together, they appear to give the house power to under take investigation on the executive by establishing committees of inquiry, where such a committee is formed, it is usually given full powers necessary for the collection of required information. The committees which debate the matter may report back to the house or take any measure it thinks fit.

¹⁰² Ibid,

¹⁰³ Id, cited on note 76 Art 55(17)

The parliament also controls the utilization by the executive of the annual national budget it adopts through the Auditor-General.¹⁰⁴ The legislative exercise this control over the executive through its specialized standing bodies. The Auditor-General audits the financial affairs of the Government and submits his report to the House of People's Representatives. Then the house may take any measure it seems fit based on the report sent to it.

The legislature controls the executive, to the effect that, whether or not it violate, through public servant, the human right or citizens guaranteed by the constitution and international human right instruments to which Ethiopia is a party. The constitution empowered the house to established Human right commission.¹⁰⁵ However, such its power has a limitation by law.

The constitutional provision that empowers the legislature to establish an ombudsman.¹⁰⁶ Is the other way of legislative control over the executive. The ombudsman is simply a body, which ensures the dispensation of administrative justice to citizens when they are victim of decisions of the public servant. So, its power to establish an ombudsman who stands for the citizen's justice, the house can keep control on the executive's administrative actions.

Further more, the head of the government is elected by the house of peoples representatives and the council of ministers and the prime minister are accountable to the house, however, the house has only the power of approval with respect to the appointment of the minister and other high executive officials. The prime minister retains the power of nomination and presentation for appointment. The House of People's Representative can approve or reject the nominees presented by the

¹⁰⁴ Id, cited on note 20

¹⁰⁵ Ibid Art 101(2)

¹⁰⁶ Id cited on note16

prime minister. It cannot appoint persons not nominated by the prime ministers.

When we look to vice versa of the parliament and executive relations. The executive plays a major role in the legislative process. This means that, not only the parliament exercise control over the executive but also the executive has mechanisms by which it exercises control over the parliaments. The strong weapon that the executive can use to control the legislature is the power of the prime minister to dissolve the House of people's Representatives with the majority agreement,¹⁰⁷ such a dissolution occurs not to settle any disagreement between the House and the government, but to take an opportunity to strengthen the position of the party or coalition of parties. However, dissolution can be used, as a weapon by the government with the house cannot be settled otherwise. This weapon is the control of ministerial responsibility, a counter. Weapon available to the government as the dissolution of the government a result of a vote of censure or a vote of non-confidence. In the constitution of ours, dissolution of the house is mandatory when these situations happen. It is in the sense that the president has no option other than dissolving the house and calling for a new general election. In this new general election some of most members of the House may not return their seats and hence, an eventuality most would like to avoid.

In the other hand, normally, bills submitted by government are given priority and, from this point of view; the House acts on the initiative of the government. The laws passed are, therefore, to a large measure fall under executive control.

Private members bills are not given priority and normally fail for lack of the required majority even when given the chance to be heard, so long as

¹⁰⁷ Id cited on note 17

the government enjoys majority in the House such bills do not have any chance of passage when in-consistent with government policies.

Concerning the national budget, too, the House can only act on the proposals of the government. The preparation of annual work programs and budget appropriations for such is so complicated and needing much effort that the House can rarely afford to deal with them in depth. What usually happens is that the house passes the budget bills as proposed by the executive with out substantial modification.

2.5.2 Legislative and Judiciary Relations

With regards parliament and judiciary relations there are two ways by which the parliament exercise control over the judiciary branch. These are the process of appointment of federal judges and the process of interpretation of the constitution. Let us see them one by one.

In the case of the appointment of judges, it is the House of People's Representatives who approves the appointment of federal judges.¹⁰⁸ Thus it has a hand on the judiciary branch with which it may choose to control by refusing to approve the appointment of particular judges. The same apply to state governments.

The interpretation of the constitution is the second incidence of control by the parliament. The federation council, which is referred as the other branch of our parliament, has the sole authority to interpreter the constitution when constitutional dispute arises. Therefore, the parliament plays key role through which it exercises control. Because when interpreting the constitution the parliament is exercising a judicial function.

Normally, control over the constitutionality of laws passed by the parliament is control exercised over the parliament itself. Such control is usually exercised weather by judiciary or by an independent body of the

¹⁰⁸ Ibid Art 60(1) and (2)

parliament. In our case, the House of federation is part of the parliament and it can be said that the House of federation do not exercise control on its other part, the parliament. Yet, the House of federation does not take part in issuing laws and is independent of the House, which enacts all laws.

The house of federation, therefore, is in a position to control the constitutional validity of the laws enacted by the House (parliament). But the purpose to which the House of federation is given power to interpret the constitution is not so much to control the parliament as to control the judiciary on constitutional matters. This clearly implies that the judiciary, in Ethiopia, does not have the power of judicial review of the laws issued by the legislature.

This arrangement is in conformity with one of the min goals set by the constitution, i.e. for the sec of the protection of people's rights and the equalities of Nations Nationalities and people's. Accordingly the House of federation, composed of representatives of Nations Nationalities and people's is deemed to be the guardian such people's rights and controls decisions of the judiciary involving these rights of peoples.

2.5.3. Executive and Judiciary Relations

The only incidence of relations the executive has with the judiciary branch is reflected in the power of nomination of federal judges by the prime minister.¹⁰⁹ By this power of nomination the prime minister will be able to control both the legislature and the judiciary. The House of People's Representatives can only appoint persons nominated by the prime minister; it cannot appoint its own nominees as judges. The prime minister also controls the judiciary through his power on nominating the judges as it enables him to select person of his choice to be appointed judges.

¹⁰⁹ Id, cited on note 18

On the other hand the supreme federal judicial authority is vested in the federal Supreme Court and in such federal high courts and first instance courts as the House of the people's representatives may establish.¹¹⁰ The judicial authority of our judiciary consists the settling of disputes which arise under ordinary law and disposing of disputes involving constitutional interpretation on the basis of the constitutional interpretation the House of federation.

It follows, therefore, that the judiciary has the power of review over administrative acts as long as such acts infringe rights protected under ordinary law or even constitutionally protected rights and liberties in respect of which there is no dispute of interpretation. This is, therefore, a power exercised by the judiciary with a view to keeping the executive within the bounds of constitutional and legal mandates.

2.6. The Concept of Checks and Balance

The concept of checks and balances, in general term, has two meanings: Federalism and separation of powers.¹¹¹ Federalism is the division of the government between the national, state or provincials and local levels. In a federal system the division of powers and authority are never neat and tidy-federal, state and local agencies can all have overlapping and even conflicting agendas in such areas. But federalism does maximize opportunities the citizen's involvement so vital to the functioning of democratic society.¹¹² The idea of checks and balances, in its second sense, refers to the separation of power that the framers of the USA constitution in 1789 so "done by taking great care" to ensure that the political power would not be concentrated within a single branch of the national government.¹¹³

¹¹⁰ Ibid Art 74(7)

¹¹¹ Ibid Art 78(2)

¹¹² U.S.A information Agency (what is democracy). P.22

¹¹³ Ibid P. 22

The concept of separation of powers as expressed by Montesquieu has been understood and applied differently in different constitutional systems. The Ethiopian system of 1994 provides that the House of people's representatives have power to check, other branches of government by enacting legislation which are necessary for the implementation of the programs of the executive, ratification of the annual federal budget, exercising the power of approval and appointment of prime minister, federal judges and other governmental officials, questioning and investigation of prime minister and other federal officials, using such special standing institutions, Auditor-general human right commission; office of ombudsman and federation council- in the case of interpretation of the constitution.

In the other hand the executive checks the other branches of government by power of nomination and presentation for appointment, submission and giving the priority for legislative bills, production of the annual budget, dissolution of the parliament by the prime minister.

The judiciary has no power exercising for checking the legislative as well as the executive. But it has power to review over administrative acts so long as such acts infringe up on rights protected under ordinary law or even constitutionally, protected rights and liberties in respect of no dispute of interpretation of the constitution.

Generally, in the Ethiopian context, there exists checking mechanisms in a limited manner between the legislature and the executive and between the judiciary and executive. But the judiciary has no power to check the legislative; while it is checked by the legislature in respect of interpretation, of the constitution and appointment as well as approval of the budget. We have no more checking mechanisms except the above ones.

Finally it can be concluded that there is no balance between the three branches of government.

CHAPTER THREE

DELEGATION OF POWER TO ADMINISTRATIVE AGENCIES V/S PRINCIPLE OF SEPARATION OF POWERS UNDER FDRE CONSTITUTION

3.1 DEFINITION OF ADMINISTRATIVE AGENCIES

To the phrase “*Administrative agency*” different definitions have been provided by different scholars. Some have defined the term based on the power agencies have, and others have defined it by listing out those specific institutions which are deemed to be administrative agencies. Breyer Stewart defines body *Administrative agency* as “an authority of a government other than a court or a legislative, with power to make and implement laws in various ways”¹¹⁴

The term “*in various ways*” refers to how the laws are made in different ways. These different laws being, either through case by case adjudication or through promulgation of rules and regulation of general applicability.¹¹⁵ But the fact of making law through case by case adjudication is more relevant to common law countries. According to this definition administrative agencies have the power to make and implement laws.

The other definition is that, which provided by K.C Devis who have based the definition of administrative agencies on the power they have vested with. He defined it as follows. “Administrative agency is a governmental organ, other than a court and a legislative body, which affects the rights of private individuals through either adjudication or rule making. Administrative agencies can also known by different names such as

¹¹⁴ Stephen G. Breyer and Richard B. Stewart, Administrative law and regulatory policy, 1979.P. 1

¹¹⁵ Ibid

department, authority, commission, Berou, board officer, corporation, administrator, agency, divisions or office.¹¹⁶

In its definition, K.C devis, by excluding the courts and the legislative body has shown that Administrative agencies consists of only the executive body of government. Another point noted in his definitions the power these administrative agencies have according to his definition, these agencies are vested only with the power to adjudicated and make rules. When compared with breyer's definition the K.C.S definition fails to address a power of administrative agencies. i.e. the power to implement laws of administrative agencies. There fore, administrative agencies have the power to make, adjudicate and implement laws.

The draft administrative procedure proclamation of ours is used to define the term by pointing out those institutions which are deemed to be administrative agencies. Article 2(1) of the draft proclamation defines it as “ any ministry, commission, public authorities of the Federal Democratic Republic of Ethiopia , including the Addis Ababa and Dirre Dawa cities administration, competent to render administrative decisions and exercising regulatory or supervisory functions. The term shall include the agency head and one or more members of the agency head or agency employees or other person directly or indirectly purporting to act on behalf of or under the authority of the agency head”.¹¹⁷

The draft administrative procedure proclamation's definition seems to be different from the above definitions. It begins to define the term by listing out those institutions that it deemed Administrative agencies. From this definition one can understand that administrative agencies are parts of the executive. That is because only those organs that are competent to

¹¹⁶ Kenneth Culp Oavis, Administrative law, triatise , 1958,page 1

¹¹⁷ Draft federal Administrative procedure proclamation, prepared by Ethiopian justice and legal system research institution.2001

render decisions and exercise regulatory or supervisory functions that are to be deemed Administrative agencies.

In general, based on the above dealt definitions, we may define the term *administrative agency* as: an authority of government other than a court or legislative body with power to regulate and supervise behavior, to make law, to interpret and implement law in various ways.

3.2 POWERS OF ADMINISTRATIVE AGENCIES

Administrative agencies are established for the main purpose of carrying out administrative functions. It is said that government agency action can include rule making, adjudication and the enforcement of a specific regulatory agenda.¹¹⁸ Unlike their judicial and legislative powers, which they acquire by delegation, administrative powers are inherent to them. Some agencies are vested with all of the above mentioned powers, while others are versed with only one or to of the powers. These, however, are not the only powers with which administrative agencies are vested. They are also vested with the powers to investigating, supervising prosecuting, advising and declaring.¹¹⁹

As mentioned above, all these powers are given for these agencies for a certain reason. And this purpose is to enable these agencies to carry out or execute the functions they are given.¹²⁰ These functions may be regulation of private conduct, government exactions, disbursement of money and direct government provision of goods and services.¹²¹ Let us, now, try to see each power of administrative agencies one by one.

¹¹⁸ Bizuneh Beyene **Protection of individual right in administrative proceedings**, (unpublished) AAU, page 4

¹¹⁹ Supra note 1, page, 5

¹²⁰ Supra note 3, page 2

¹²¹ Supra note 19

3.2.2 RULE MAKING POWER OF ADMINISTRATIVE

Rule making is defined as the process that executive agencies use to create, or promulgate regulations.¹²² These definitions have a problem. That is it only recognizes regulations as rules made by administrative agencies.

However, Administrative agencies are empowered with power to make regulations, directives, rules, orders, schemes, by laws, licenses, warrants, instruments of approval minutes, etc... as the legislator thinks fit.¹²³ The house of people's representatives, who is the primary legislator of our country, as inscribed in article 55(1) of the constitution, may try to fill the gaps that it can't adequately address, by entrusting administrative agencies with the above mentioned powers.

The House of Peoples Representatives, as pointed out by Breyer, may authorize the agency to prescribe standard of conduct while providing it with sanctions for who ever has violated the prescribed standards of conduct."¹²⁴ Also in other cases, a statutory scheme will not become operative until after the agency has exercised a delegated authority to make such rules.¹²⁵ The rule making authority may also be given to resolve doubtful cases, or to prevent avoidance of statutory commands.¹²⁶ In other case, it may be necessary to carry out the purpose of the statute.¹²⁷ This, though, has raises debates in many cases, that agencies only have power to make laws relating to their internal administration and procedure and that they don't have authorization to

¹²²Supra note 8, page 31

¹²³Supra note 3, page 399

¹²⁴Ibid

¹²⁵Ibid

¹²⁶Ibid

¹²⁷Ibid

make substantive rules.¹²⁸ All in all, the legislator can give powers in the above listed ways.

Laws can be enacted through adjudication or promulgation, where an agency has been vested with both rulemaking and adjudicatory powers.¹²⁹ In common law countries, agencies usually have to first decide whether to develop law and policy through adjudication or promulgation.¹³⁰ However, this is not an issue in Ethiopia because it doesn't use precedent law and the proclamations empowering the agencies with certain powers expressly state the kind of power the agency is supposed to use. A good example would be proclamation number 262/2002/ empowering the council of ministers with the power to make regulation by virtue of Art 88(1).

Further more, the legislator is not left with out any limitation when empowering agencies with power to make rules. There are limitations on the legislator. This limitation is that , the legislator cannot give them power to make general rules.¹³¹ First it has to provide the agencies with the general frame work and leave the specifics of the law to the administrative agencies.¹³² There for administrative agencies are only empowered to make detailed laws but not general ones.

It can be concluded that, though administrative agencies legislation is considered as an infringement of the doctrine of separation of powers, still more legislation are produced by these agencies than by the legislator.¹³³ Also it is this fact that has led administrative law writers to conclude that administrative legislations are necessary evils.¹³⁴

¹²⁸Ibid

¹²⁹Ibid

¹³⁰Ibid

¹³¹H.W.R , Wade, Administrative law, 5th Edition 1988,page 733

¹³²Supra note 19

¹³³Supra note 39

¹³⁴Supra note 5 page 47

3.2.1.1 THE REASON FOR DELEGATED LEGISLATION

The reason for delegation of legislative power to administrative agencies lies on the fact that the complexities of modern administration, pressure up on parliament, technicality of subject matter, need for flexibility, state of emergency case, and experimentation.¹³⁵ The legislator only enacts only general guidelines and it then delegates rulemaking power to agencies to enact laws within the required specifications.¹³⁶ This is because of the fact that it is not feasible for the legislator to enact detailed laws that govern every aspect of social, economic and political life.¹³⁷

The fact that some legislation may need consultation with experts and interested parties before being enacted is the other reason justifying delegation.¹³⁸ In this respect, it is believed that administrative agencies are better suited for the facilitating of such consultation.¹³⁹ Laws that

directly affect the society are known as detailed laws.¹⁴⁰ Hence, these laws require due deliberation and consultation with those affected before enactment. This is believed better done in the hands of administrative agencies rather than the parliament.

Detailed laws may also need frequent amendment. This is because of their detailed nature they tend to exclude different possibility.¹⁴¹ Also the change in general conditions of the society may need change in these laws.¹⁴² And this need of change in law can be better addressed by administrative agencies than the parliament. The latter can not swiftly

¹³⁵ Abera Jembere, Materials on Administrative law, Unpublished, AAU, 1985 P.32

¹³⁶ http://en.wikipedia.org/wiki/Rule_making, February 2007.

¹³⁷ Terence Ingman, The English Legal process, 1996, page 23

¹³⁸ A.W. Bradley and K.D Ewing, Constitutional and Administrative law, 12th Ed, 1997, P. 718

¹³⁹ Ibid

¹⁴⁰ Supra note 3, page 18

¹⁴¹ Supra note 6, page 719

¹⁴² Supra note 3

respond to the need for change in laws due to its cumbersome law making procedure and because it is burdened with other tasks to perform.¹⁴³

In other hand, cases by which the government should have take immediate action may arise.¹⁴⁴ For example, a state of emergency constitutes one of such case.¹⁴⁵ The other reason for delegation of legislation is the opportunity it provides for experiment action which refers the application of newly evolved techniques and procedures through enacting laws.¹⁴⁶

In general, these are the main specific reasons for the delegation of legislative power to administrative agencies.

3.2.1.2 Rule Making procedure

As we have seen earlier, the powers of administrative agencies, they have the power to enact laws through delegation. When exercising such power there is a danger of using it arbitrarily. There fore, there are procedures that are believed to serve as a limitation on arbitrary use of the rule making power by administrative agencies. Let us see them in general.

Wade administrative law lists down some procedures for administrative rule making. These are informing the public of the proposal rules, taking public comments on the proposed rules, analyzing and responding to the public comments, creating a permanent record of its analysis and the proceeds.¹⁴⁷ Etc...

On the other hand, the American Administrative procedure act of 1946 lays down the procedures governing rule making by administrative

¹⁴³Ibid

¹⁴⁴Ibid

¹⁴⁵Supra note 6 page 719

¹⁴⁶Supra note 3

¹⁴⁷H.W.R Wade, Administrative law, 5th edition, 1988 P. 733

agencies. The primary procedure in this act is initiation.¹⁴⁸ Next we have the preliminary drafting.¹⁴⁹ And then comes notification of the draft.¹⁵⁰ After notification comments on the proposal will follow.¹⁵¹ Then the next and final stage is publication of the rule proposed.¹⁵² These are the procedures for rule making by administrative agencies of the American administrative procedure Act.

When we come to the rule making procedures of Ethiopia, the draft federal administrative procedure proclamation provides some basic procedures to be followed by agencies when they make delegated legislation. The first is the procedure before the adoption of the rules. This includes notice solicitation of comments from classes of persons likely to be affected by the rule to be adopted,¹⁵³ publication of the text of the proposed rule and they shall give due attention to the comments of the interested parties.¹⁵⁴

The next procedure is the adoption step. This is only done after claims, issues or requests of interested parties on the topic are settled. They cannot adopt substantially different rules from the proposed and announced rules. Then publication¹⁵⁵ of the proposed rule is the other under this.

The last procedure deals with review of the agency rules. It requires the agencies to review their rules at least annually to determine whether any new rule should be adopted.¹⁵⁶

3.2.2 JUDICIAL POWER

¹⁴⁸<http://link.istor.org/sici?sici=00263397%28196008%294%3A3%3c267%3APMBGA%3F.2.0.Co%3BE-2, February, 2007. Page 269>

¹⁴⁹ Id, page 277

¹⁵⁰ <http://Web.2.Westlaw.com/welcome/Law school practioner /default.W/?bHcp=1&FN=%5Ftop&MT=Law school practioner &rs=Law 52%=%split 2%2Eo>, April 2007

¹⁵¹ Administrative procedure Act. Section 4(b)page 55

¹⁵² Ibid

¹⁵³ Draft federal procedure proclamation prepared by Ethiopian Justice and legal system research institution, 2001, AA5-19

¹⁵⁴ Ibid Arts 5-9

¹⁵⁵ Ibid Arts 10-19

¹⁵⁶ Ibid page 20

Administrative agencies are endowed with judicial power. They may only have such power through delegation by the legislator.¹⁵⁷ And the legislator itself can only delegate such power when it is permitted by the constitution.¹⁵⁸ This is so because this power is believed to be interference on the court's power.¹⁵⁹

According to Wade administrative law judicial power of administrative agencies consists of two elements i.e. hearing and determination, and Finality.¹⁶⁰ Unlike hearing and determination, our draft administrative proclamation, under its Art. 2(2) have recognized the finality clause in adjudication by an administrative agency. It reads:- “ *Adjudication is every final decisions, order, or award of an administrative authority having as its object or effect the imposition of sanction or the grant or refusal of relief* “

The effect finality clause, there fore, is that the determination becomes enforceable from that day the decision is forwarded. when one say's certain determination is final, it refers to the fact that the determination is not subject to review or it can also be refereed as that the decision is subject to review. Administrative agencies by exercising this power seek to determine if the conduct of individuals are inline with the laws that they have made.¹⁶¹ And also they protect the right and interests of individual citizens using their judicial powers.¹⁶² Administrative adjudication would have a recognized status, if once adjudication by administrative agencies is recognized. Administrative agencies decisions have the same effect as judicial decisions.¹⁶³ Such a case is also

¹⁵⁷Milton Michael Carrow, The Background of Administrative Law, 1948,page 35

¹⁵⁸Dalmas H.Nelson, Administrative Agencies of the USA,1964.P6

¹⁵⁹Ibid

¹⁶⁰H.W.R Wade Administrative law, 5th Ed. Oxford university press. Page 25

¹⁶¹H.W.R Wade Administrative Law 5th Ed, 1988,Page 15

¹⁶²Milton Michael Carrow, The Background of Administrative Law 1948,Page 35

¹⁶³Supra note 3.Page 6

enshrined by the draft administrative proclamation of ours. Under its Article 46(1). It states that~“%<KA~ -d'@-< %oE u?~ -d'@-< AJ“K<:.”

From this, one can understand that administrative agency decisions are equally recognized and effective with that of the regular courts. This status given to administrative decisions enables administrative agencies to pass judgments on administrative matters by themselves. But this does not mean that administrative decisions are not subject to appeal to the ordinary courts.

3.2.2.1 REASONS FOR DELEGATION OF JUDICIAL POWER

There are certain reasons that necessitate the exercise of judicial power by administrative agencies. These are: - the belief and facts that administrative tribunals could offer speedier, cheaper and more accessible justice while the process in the court of law is elaborate slow and costly.¹⁶⁴ The other reason for delegation of judicial power to administrative tribunal is that of Expertise judges in the ordinary courts may lack the expertise to handle the cases that arise in administrative process while administrative decision makers have an expert knowledge about particular administrative matter there are assigned with and this enables them to dispose of the mater more fairly and expeditiously.¹⁶⁵ Generally, these are of important reasons for the creation of administrative tribunals.

3.2.3 EXECUTIVE POWER

¹⁶⁴Ibid

¹⁶⁵Supra note 22, page -15

The Executive function of the government consist primarily of initiating, formulating , and directing general policy including administration which involves the implantation and application of general policy.¹⁶⁶ When we see this power of execution in relation of administrative agencies it could be seen from two perspectives. The first sense, executions means the power to put decisions in to action.¹⁶⁷ And in its second sense, execution by administrative agencies is the power to carry out or put in to action a certain function entrusted by the legislator.¹⁶⁸

Administrative agencies are to appoint, supervise remove and direct subordinates in their executive capacity.¹⁶⁹ The other kind of execution is enforcing the decisions of a certain administrative agency with judicial power. Execution by administrative agency can be done either in respect of a decision rendered by administrative agency or a court.¹⁷⁰

As we have seen all these execution powers an administrative agency is supposed to exercise a specific function while doing this the administrative agency is not under any procedural obligation from the legislator. The administrative agency is to come up with its own procedure to be followed in the course of execution of its function. In general terms, administrative agencies do have the power to execute which ever way execution is explained.

¹⁶⁶ Dagnachew Asrat, summery notes on administrative law. April 2007, page 25

¹⁶⁷ Semahegn Gash, **Due process of law and Administrative Decision in Ethiopia** , (Unpublished) AAU. Page 16

¹⁶⁸ P.H.Collin, **Law dictionary**, 2nd Ed Universal Book Stall,

¹⁶⁹ Riginald parker, Administrative law, The Bobbs - Merrill Company, Inc. publishers, Indian polis, 1952, page 287

¹⁷⁰ Ibid

3.3 LEGISLATIVE AND JUDICIAL POWERS OF ADMINISTRATIVE AGENCY VIS A VIS SEPARATION

In every democratic government there are three distinct organs with distinct powers. These are the legislative, executive and judicial powers. The legislative organ is the law making organ of the government while the executive and the judiciary are the law implementing and law interpreting organs of the government, respectively. The basis for this federation is the separation of powers principle.¹⁷¹

The doctrine of separation of powers has been stated by different scholars differently. From among these scholars, Montesquieu, James Madison and Sir Carleton Allen are the main ones argued about what is meant by separation of power. Now let us examine whether the exercise of legislative and judicial powers by administrative agency is in conformity with or against the doctrine of separation of powers. We will do so by analyzing the arguments forwarded by the above mentioned scholars.

Montesquieu argues that:-

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws and execute in a tyrannical manner. Again there is no liberty, if the power of judging be not separated from the legislative and executive powers. Where it joined the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator, were it joined with the executive powers; the judge might behave with all the violence of an apprehension.¹⁷²

^mAdministrative Act, Section 4(B) page 37

¹⁷² Supra note 17, page 15-16

Different scholars forwarded many arguments on such Montesquieu's meaning interpretation of separation. Some argue what he meant was that one branch of government should stay in its limiting walls and not

go beyond these walls affecting the other branch of government.¹⁷³ This means that the executive will only be concerned with implementing laws and shall not issue or interpret laws for it is the function of the legislator and the judiciary respectively.

In the other hand, James Madison argues that:-

Montesquieu did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.¹⁷⁴

Therefore, Madison's argument is that the doctrine of separation of power is only countered only when the executive takes the whole law making and implementing powers, which is the power of the legislator and of the judiciary, respectively.

Using Madison's line of argument

In relation to the doctrine of separation of powers, one would conclude that since administrative agencies are not exercising the whole of law making and law interpreting, the conferring of these powers to administrative agencies wouldn't be contrary to the separation of powers

¹⁷³ Morris D.Forkoskh, A Treatise on Administrative Law, The Bobbs Merrill Company, Inc, Publisher, Indian police, 1956, page 36

¹⁷⁴ Supra note 17,page 16

doctrine. Sir Charlton Allen also forwards his argument in support of the above argument.

He said that:- Conferring administrative agencies with law making, adjudicating and executing is not contrary to the doctrine of separation of powers. Let me state the wording of his argument.

“ ... Separation of powers suggests that freedom is preserved if the sum of power is widely distributed and that it is more important that

there should be many authorities exercising legislative, administrative and judicial powers than that each of these three types of powers should be exercised by the different authority. Thus the real argument is not whether the executive, for example, is executive legislative or judicial powers which properly belong to parliament or the courts (for no kind of power belongs to any particular authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action “¹⁷⁵

The basis of sir Charlton’s argument is different from that of Madison’s. Even though sir Charlton argues that empowering administrative agencies with different powers is not in contradiction with the doctrine of separation of powers, he argues that the doctrine of separation of powers is not really about conferring different organs of government with different and distinct power; rather it is about conferring these organs with pieces of different powers so that an organ may not monopolize all the power.

However, many scholars tend to agree that conferring of legislative, adjudicative and executive powers on administrative agencies are contrary to the separation of powers doctrine. They argue that such conferring of powers is necessary and has to be viewed as an exception to

¹⁷⁵ Supra note 3, page 15

the doctrine of separation of powers.¹⁷⁶ It is necessary in that society has grown complex and the need for government to be more involved in societal day to day affairs has arisen.¹⁷⁷ The government, in order to efficiently and effectively address the needs of societal affairs the state has to confer the powers of its different organs on agencies that are best suited to address those needs.¹⁷⁸ Even though, conferring administrative agencies with different powers is necessary and do have all the above mentioned reasons necessitated them to be delegated, it is an infringement of the doctrine of separation of powers.

So far we have been discussing the general aspects of separation doctrine in light of legislative and adjudication powers of Administrative agencies by analyzing the arguments of the different scholars. Now let us see it in the Ethiopian context.

3.3.1 LEGISLATIVE AND JUDICIAL POWERS OF ADMINISTRATIVE AGENCIES VIS A VIS SEPARATION IN ETHIOPIA

When we talk of the doctrine of separation of powers under FDRE constitution, it is clear that our constitution upheld the doctrine of separation of powers. This can be asserted under Articles 72(1), 79(1) and 55(1). As has been defined in chapter (one) of the paper” separation of powers” is simply to mean the distribution of the three branches of government into three distinct areas. Thus we can say that our constitution is one that upheld the doctrine of separation of powers. This is because for it vests the highest executive power in the prime minister and council of minister under Article 72(1) , Judicial power in the courts under Article 79(1) and for it exclusively vests power of legislation to the

¹⁷⁶ Wade and Forsythe, Administrative Law, 7th Ed.1988,page 415

¹⁷⁷ Lord Jempleman and Michael .T. Molan Administrative Law, 2nd Ed, old Bailey press, page 1-2

¹⁷⁸ Craig R. Ducat and Harold W. chase, constitutional interpretation, 3rd Ed, West publishing co., St ,Poul, 1988page 132

House of people's Representatives under Article 55(1) . This means that our constitution vests the three government organs three distinct and separated powers. i.e. law making to the house of people representatives, adjudication to the courts and law implementation to the executive. But the executive in Ethiopia through its agencies is exercising all executive, Legislative and judicial powers. There for, one can conclude that the exercise by administrative agencies of both law making and adjudication is an infringement of separation of powers under FDRE constitution.

We have seen the legislative and adjudicative powers of administrative agencies in light of the doctrine of separation of powers. Now let's proceed to see constitutionality of such powers under FDRE constitution.

3.4 CONSTITUTIONALITY OF LEGISLATION AND ADJUDICATION BY ADMINISTRATIVE AGENCIES IN ETHIOPIA:-

In the previous sections we discussed that the administrative agencies have both legislative and adjudicative powers. In this section we will try to see whether rule making and adjudication by administrative agencies is constitutional or not under FDRE constitution. Let us see them one by one.

3.4.1 CONSTITUTIONALITY OF LEGISLATION BY ADMINISTRATIVE AGENCIES IN ETHIOPIA

The FDRE constitution vests primary power of legislation in the house of people's representatives. This house has the power to make law in all matters assigned by the constitution to federal jurisdiction by virtue of Article 55(1) . Though the house of people's representative is vested with this power, the constitution doesn't exclude all others from making of laws. This is clearly seen in Article 77(13) of the FDRE constitution, which gives the council of ministers of power to enact regulation. But

this is only where the house of people's representatives delegates such power to the council.

The council of ministers being an administrative agency, as it falls under the definition given in the ongoing chapter, is empowered by the constitution to make regulations.¹⁷⁹ There is also another situation by which it is empowered to make directives in Article 74(5) of FDRE constitution, hence, it can be concluded that the council of ministers have the right to make rules as enshrined by the constitution.

Therefore, we have got one administrative agency i.e. the council of ministers which is constitutionally empowered to rule making. Now let us try to discuss the rule making power being exercised is constitutional.

In Ethiopia, other administrative agencies make and apply directives. Since, directives in the constitution are only cited in Article 74(3) and(5) . Even these directives are directives to be adopted by either the House of People's Representatives or by the Council of Ministries. Nowhere in the constitution is the power of administrative agencies to make rules expressly provided for. Also nowhere in the constitution is the power to delegate rule making to administrative agencies granted to any organ of government. Thus, one can argue that the exercise of rule making power by administrative agencies is unconstitutional except for the council of ministers. This is for the council is given such power by the constitution.

Even though the exercise of rule making power by administrative agencies is unconstitutional administrative agencies should be able to exercise rule making power. This is highly because they need these powers to facilitate the day to day encounters with society and to effectively deal with the ever increasing and complex, issues facing society. In addition to this as has been briefly discussed, for the legislator

¹⁷⁹ FDRE constitution Article 77(13)

is short handed to regulate all aspects of every day affairs, For administrative agencies are with the required specialization, agencies are better

suited than the legislator to make laws that pertains to the day-to-day life of the society in addressing their needs. There fore, despite their being unconstitutional in rule making powers, administrative agencies do have important role in the exercise of such rule making power.

3.4.1.1 LEGISLATIVE PROCEDURE IN ETHIOPIA

In this chapter we have seen the general aspects of rule making procedures. Now we will try to discuss particularly the rulemaking procedures in Ethiopia.

In Ethiopia though administrative agencies are conferred with the rule making power, they use their power in any way they think fit.

Although the absence of procedures might help them conduct their work expeditiously thereby enabling them to answer in a speedy manner to the demands of the public, there is a danger that these agencies would use their power arbitrarily. This is a well established fear since the executive with all its discretionary powers for running the routine administration may abuse its power.¹⁸⁰ And the society is direct victim of these adverse consequences for specific laws tend to attach themselves to the primary, direct and day-to-day interest of the society.¹⁸¹

There are also another disadvantages of not having well established procedures, this means that not only tyrannical laws but also unpredictability and instability are also possible negative consequences.

⁰ Riginald Parker, Administrative Law, The Bobbs -Merrill Company, Inc, Publisher Indian polis, 1952,page 18

¹⁸¹ Ibid

Where there are not procedures to be followed by administrative agencies. They would have the opportunity to alter any rule at any given day which in turn would lead to unpredictability and instability.

Therefore, administrative agencies when they make rule should have rule making procedures to be followed however, in Ethiopia there are no legally binding procedures for rule making. Administrative agencies are using their own ways of making rules.

3.4.2 CONSTITUTIONALITY OF ADJUDICATION BY ADMINISTRATIVE AGENCIES IN ETHIOPIA

So far we have seen that administrative agencies have adjudication power. It is true that the executive is one branch of the government. It takes its primary power from the constitution. Since administrative agencies are part of the executive they are exercising adjudication which is the power to be exercised by and mandated to the ordinary courts. If this, now the question in this section is that whether the adjudication by administrative agencies is constitutional or not, for this purpose, let us proceed to examine the constitutional provisions regarding judicial power.

The FDRE constitution under its Article 79(1) vests judicial power solely in the courts. This means that, courts are vested with an exclusive power to adjudicate cases as it is in their nature to entertain cases and pass binding decisions.

We have also other constitutional provisions which vests judicial power in the courts and declared the independence of courts. It is Article 78(4) of the constitution. It reads that an independent judiciary is established by this constitution. from this constitutional provision one can understand that ordinary courts are declared to be independent from any interference of government institutions, i.e. the legislative and executive branches.

Though the above two provisions confer judicial power solely in the ordinary courts, this means not that the constitution completely deprive of other institutions from the exercise of adjudication power. This is clearly stated under Article 78(4) which allows the exercise of judicial power to be exercised by special or adhoc courts. When we see the wording of this Article, which says *“special or adhoc courts which take away judicial power from the regular courts”* we simply can understand that the constitution is mandating administrative agencies to exercise judicial power.

In addition to this, we have also another constitutional provision which mandated the exercise of judicial power by an organ other than ordinary courts. The constitution under Article 37(1) clearly shows us that exercise of judicial power by administrative agencies. The phrase that reads “a court of law or any other competent organ with judicial power” clearly could be mean to Administrative agencies. There fore, the constitution under this article has recognized other organ with judicial power though it does not enumerate the names of those specific institutions.

We have said that the constitution has recognized administrative tribunals with judicial power. This recognition by the constitution of other administrative tribunals having judicial power is therefore, a contradiction between the two provisions of the constitution. i.e. a contradiction between Article 79(1) cum 78(4) with Art 37(1).

In addition to this, Article 37(1) of the constitution which recognizes Administrative tribunals is not only a contradictory article to Article 79(1) but also is a provision which abolishes the constitutional provision that reads judicial power be vested solely in courts. Hence it could not be said that there is an independent judicial organ, for we do have other

constitutional organ endowed with judicial power. i.e. administrative tribunals.

Therefore, According to Article 37(1) of the constitution, not only the ordinary courts but also administrative agencies are conferred with the power to exercise of judicial power. Hence, one can conclude that the exercise of adjudication by Administrative agencies is not unconstitutional for the constitution itself provided the exercise of such power by special or adhoc courts. i.e. Administrative agencies or for it provides judicial power to be exercised by not only ordinary courts but also by any other competent body with judicial power.

Finally, Administrative tribunals that exercise judicial power in Ethiopia are constitutional. But the constitution doesn't specifically enumerate the names of these institutions.

CONCLUSION AND RECOMMENDATION

As discussed deeply in chapter three of the paper, it is the increasing and complex relation between the state and private individuals that resulted the coming in to existence of administrative agencies. To discharge their responsibility, these agencies are conferred with powers like execution, adjudication and rule making. Because of this concentrated powers these agencies have along side them the danger of abuse of power. And society has through history has learned that with power comes arbitrariness and abuse. Also the exercise of these concentrated powers by agencies contravened the pillars of any modern legal system, i.e. the separation of powers doctrine and constitutionality. Therefore, though the conferring of administrative agencies with adjudication and rule making power has helped lighten the burden of the government by answering the ever increasing demand of the society, there is also a danger of arbitrariness and abuse of such powers. As has been pointed in the proposal part, due to abuse of power public liberty and property will be endangered.

There are different mechanisms of limiting or controlling abuse of powers by administrative agencies. These are through applying the separation of power doctrine, looking into the constitutionality of their powers and providing them with procedures while exercising their powers. Applying all these serves as prevention for the existence of arbitrariness.

It has been concluded that exercise of the three powers by administrative agencies is a necessary evil. Such conferring of powers on administrative agencies is contrary to the separation of powers. We have said that the Ethiopian constitution is the one that vests the function of the three branches of government in different organs. But administrative agencies in Ethiopia are exercising all the three forms of powers. There fore, since the constitution vests each organ of the government with respective

powers, the exercise by administrative agencies of all powers is an infringement of the doctrine of separation of powers under FDRE constitution.

With respect to constitutionality, the paper has tried to see the different provisions as to constitutionality of the exercise of such powers by administrative agencies in Ethiopia .The FDRE constitution, in respect of rule making, empowered only the council of ministers which is part of the executive i.e. an administrative agency. But also we have said that other administrative agencies are exercising legislative powers by delegation. Though these agencies do not directly derive this power from the constitution they could not be said unconstitutional. , Rather it be regulated by the principle of hierarchy of laws and the principle of delegation.

When we come back to constitutionality of adjudication by administrative agencies, the FDRE constitution clearly allows the exercise of such power by an institution other than the ordinary courts. But it does not provide these quasi judicial institutions. We have said before that Art. 37(1) of The Ethiopian constitution has given recognition to administrative tribunals having judicial powers. Thus adjudication by administrative agencies is not unconstitutional. When we see this Article with Art.79 (1) and 78(4) it seems to be contradictory, But there is no contradiction rather, it is a matter of interpretation.

The other mechanism of controlling abuse of power is providing procedures for administrative agencies when they exercise their powers. As we have seen earlier, in Ethiopia the legislator doesn't provide procedures for administrative agencies to use. Since, procedures for administrative agencies exercising abuse of powers, the legislator did not provide procedures for administrative agencies in Ethiopia. And the procedures applied by administrative agencies are not binding. Hence,

this lack of procedure to be followed by administrative agencies when they discharge their duties creates possibility of abuse of power. This highly endangers societies life liberty and property.

The writer recommends that the legislator have to provide administrative agencies with a legal frame work by enacting an administrative procedures law to be followed, to address and safeguard societies interest from possible abuse of power by an administrative agency.

Bibliography

A. Codes

^ The Ethiopian Constitution of 1994

B. Books and other material sources.

1. Fasil HAHUM “ Constitution for nation of nations” , (1997) Asmara
2. MAURO cappelliti, Judicial Review in the contemporary world, (The Bobbs Merrill Inc New York). 1971.
3. Stephen G. Breyer and Richard B. Stewart, Administrative law and Regulatory policy . Little, Brown and company, Boston and Toronto, 1979.
4. Kenneth Kulp Davis, Administrative Law treatise, St, Paul Minn. West Publishing Co., 1958
5. Draft Federal Administrative procedure proclamation; prepared by Ethiopian justice system research instituon.2001
6. Bizuneh Beyne,” protection of Individual right in Administrative proceeding, A survey based on some agencies, (unpublished) Faculty of Law, AAU.
7. H.W.R Wade , Administrative Law, 5th Ed oxford university press. 1988
8. Abbera Jemberre, Materials on Administrative law . (Unpublished) AAU 1985
9. Terence Igman, The English legal process, 6th Edition, back stone press Limited , 1996.
10. [Http://en.Wikipedia. Org /wiki/rulemaking](http://en.Wikipedia.Org/wiki/rulemaking) accused on February 2007.
11. A.W. Bradley and K.D Evening , constitutional and Administrative law, Longman, London and New York, 12th ed,1997

12. Milton Michael Corrow, The background of Administrative Law, organe Burg, New York 1948.
13. Dalmas H. Nelson , Administrative Agencies of the U.S.A , Wayne state University press. Detroit 1964
14. Semahegn Gashu, The process of law and Administrative Decision in Ethiopia. (Unpublished), Faculty of Law, AAU.
15. Reginald Parker, Administrative law, The Bobbs merril company Inc, Publisher Indian polis, 1952.
16. Morris D. and Forkosch, A Treatise on Administrative Law, The Bobs Meriril company ,Inc, Publishers Indian polis, 1956.
17. Wade and Forsyth, Administrative law, 7th ed, (Oxford University press) 1988.
18. Loard Temple man and Michael T.Molan, Administrative law, 2nd Ed, Old Bairely press.
19. Bernand Schwarty, French Administrative Law and the common law world, Newyork 1954.
20. Dagnachew Asrat, Summery Nates on Administrative law, St Marry's University college, April 2007.
21. Criag R. Ducat and Harold W. chase, Constitutional interpretation, 3rd Ed, New York, 1988.



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